No. 20-827

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Founded in 1971, Public Citizen is a nonprofit public interest organization with members and supporters in all 50 states. Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues. Among other things, Public Citizen seeks to improve transparency in government by working for greater public access to government documents and information. Public Citizen promotes openness and democratic accountability in government by requesting and making use of government records, and by providing technical and legal assistance to individuals, public interest groups, and the media who seek access to information held by government agencies. Public Citizen submits this brief to emphasize the judiciary's important role and responsibility in assessing government claims of secrecy.

SUMMARY OF ARGUMENT

To ensure that a government assertion of the state secrets privilege is proper, a court cannot merely rubber-stamp that assertion. To fulfill the courts' responsibility to serve as a check on the executive, the executive's assertions of a need for secrecy, when raised in litigation, must be subject to meaningful judicial review.

In many instances, the government's assertions that information must remain secret prove to be

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented in writing to the filing of this brief.

meritorious. In a distressing number of cases, however, the government's assertions of secrecy over information concerning national security have been baseless. For example, in the case where this Court first recognized the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1 (1953), the government claimed the privilege to withhold information that involved no genuine state secrets. In numerous other instances, the government has attempted to shield information from public access by over-classifying material or by wrongfully withholding records in response to Freedom of Information Act (FOIA) requests.

The courts thus play a critical role in assessing whether the government's assertions are meritorious. Courts are competent and well-equipped to assess government claims of secrecy and determine whether information is properly withheld. The decision below correctly recognizes that courts must meaningfully review the government's invocation of the state secrets privilege and that, wherever possible, non-sensitive information must be disentangled from sensitive information and released. In ordering remand, the decision carefully walks the appropriate line in directing the district court to examine whether disentanglement is feasible in this case.

ARGUMENT

I. The courts play an important role in assessing government claims of secrecy.

A. The separation of powers in our constitutional framework is integral to the protection of individual liberties. The Framers believed that "[t]he accumulation of powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and

whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 298 (James Madison) (Clinton Rossiter ed., 2003).

Essential to our system of checks and balances is the Judiciary's power and responsibility "to say what the law is" when presented with a case or controversy—including one over whether other branches have exceeded their legal authority. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This judicial power does not evaporate in matters involving national security. *See Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."). Although deference to the executive's national security judgments is appropriate in some circumstances, deference does not mean blind acquiescence.

> At the end of the day, it is not the role of the judiciary to serve as a help-mate to the executive branch, and it is not its role to avoid difficult decisions for fear of complicating life for federal officials. Always mindful of the fact that in times of national stress and turmoil the rule of law is everything, our role is to defend the Constitution. We do this by affording redress when government officials violate the law, even when national security is invoked as the justification.

Arar v. Ashcroft, 585 F.3d 559, 611 (2d Cir. 2009) (Parker, J., dissenting).

In the context of secret executive conduct, separation-of-powers principles take on heightened concern. Meaningful judicial oversight of executive

claims of secrecy keeps abuses of power in check. "A blind acceptance by the courts of the government's insistence on the need for secrecy ... would impermissibly compromise the independence of the judiciary and open the door to possible abuse." *In re Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392 (4th Cir. 1986). "Misplaced judicial deference to the assertion of the privilege means more than citizens left without legal remedies; sometimes it creates instability in constitutional arrangements of power." William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 105 (2005). For example, the Pentagon Papers—which the government famously attempted to keep secret in *New York Times Co. v. United States*, 403 U.S. 713 (1971)—revealed "systematic lying to the American people by four U.S. Presidents, from Harry Truman to Lyndon Johnson" about the United States' involvement in the Vietnam War. *See* Ben Bradlee, Jr., *The Deceit and Conflict Behind the Leak of the Pentagon Papers*, New Yorker, Apr. 8, 2021, https://bit.ly/3mkiJbz.

Recognizing that "the label of 'national security' may cover a multitude of sins," this Court has explained that when "[n]ational security tasks … are carried out in secret[,] … it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 522–23 (1985); *see also In re Washington Post Co.*, 807 F.2d at 391 ("History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."). The circumstances surrounding this Court's decision in *Korematsu v. United States*, 323 U.S. 214 (1944), provide a devastating illustration of government

abuses in the name of national security. There, the government "knowingly concealed from the courts" "critical contradictory evidence" that undermined the government's claim that the forced relocation and internment of Japanese Americans during World War II was a military necessity, *see Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984), leading then-Acting Solicitor General Neal Katyal to confess over a half a century later that the Solicitor General had erred in its defense of the case to this Court.[2]

Thus, as this Court stated in its seminal case on the state secrets privilege, "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9–10. Likewise, in evaluating the state secrets privilege, courts have recognized time and again the important judicial responsibility to review the executive's invocations of secrecy. *E.g.*, *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege."); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("[T]o ensure that the state secrets privilege is asserted no more frequently and sweepingly than

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[2] Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, Dep't of Just. Blog (May 20, 2011), https://bit.ly/3AXBTrN.

necessary, it is essential that the courts continue critically to examine instances of its invocation."); *see also Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) ("While the court recognizes and respects the executive's constitutional duty to protect the nation from threats, the court also takes seriously its constitutional duty to adjudicate the disputes that come before it …. To defer to a blanket assertion of secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired.").

B. Meaningful judicial review of government assertions of secrecy is crucial because the consequences of these assertions can be grave: Individuals may be denied judicial redress for violations of their rights if key evidence is withheld or a claim dismissed on the basis of the state secrets privilege. For example, the government's successful invocation of the state secrets privilege resulted in the dismissal of a Title VII case where an African American covert CIA operations officer alleged race discrimination, *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), and in the dismissal of a case where a whistleblower alleged retaliatory termination of her employment, among other claims, for reporting security breaches and misconduct in an FBI translation unit, *Edmonds v. DOJ*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 F. App'x 6 (D.C. Cir. 2005).

Dismissal of claims alleging violations of individual rights, based only on the say-so of the government defendant, "interferes with private constitutional and statutory rights which the government should be protecting." Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 Lewis & Clark

L. Rev. 99, 123 (2007); *In re United States*, 872 F.2d at 477 ("Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court, … is indeed draconian."). Thus, in reversing the dismissal of a complaint as to one defendant, the D.C. Circuit explained:

> Where the United States has sufficient grounds to invoke the state secrets privilege and decides to invoke it, allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights would run afoul of the Supreme Court's caution against precluding review of constitutional claims, *see Webster* [*v. Doe*, 486 U.S. 592, 603–04 (1988)], and against broadly interpreting evidentiary privileges, for "[w]hatever their origins, ... exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

In re Sealed Case, 494 F.3d 139, 151 (D.C. Cir. 2007) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

In addition to denying redress for past wrongs, the absence of meaningful judicial review of the executive's claim of the state secrets privilege may also eliminate a means of deterring further abuses of executive power. When the state secrets privilege is asserted over information about illegal government conduct, "the privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens." *Halkin v. Helms*, 598 F.2d 1, 13–14 (D.C. Cir. 1978) (Bazelon, J., dissenting); *see also* Weaver & Pallitto, 120 Pol. Sci. Q. at 101 ("The plain fact is that if department heads

or the president know that assertion of the privilege is tantamount to conclusive on the judiciary, and that federal judges rarely order documents for inspection, then there is great incentive on the part of the executive branch to misuse the privilege."). Indeed, many of the cases in which the government has asserted the state secrets privilege have alleged the government's participation in serious violations of individual rights: for example, the warrantless wiretapping of United States citizens in connection with the Vietnam War, the warrantless surveillance of millions of Americans in connection with the government's terrorist surveillance program, and the "extraordinary rendition" program.[3] Moreover, if key evidence is withheld from the public based on assertions of state secrets, the people's ability to hold the government accountable for its actions is hampered, and "the public is denied the opportunity to … perform the vital function of serving as a check against abuses of government power." Lyons, 11 Lewis & Clark L. Rev. at 129.

Thus, the danger of rubber-stamping executive claims of secrecy cannot be overstated. "Secrecy may tempt administrators to adopt activities contrary to law and the Constitution, but when those activities are suspected, the courts double the damage by refusing to impose costs on the executive branch for its breaches." Weaver & Pallitto, 120 Pol. Sci. Q. at 103. To guard against the "[t]he danger that high federal officials will disregard constitutional rights in

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[3] *See, e.g.*, *Halkin*, 598 F.2d 1 (warrantless surveillance in connection with the Vietnam War); *Hepting*, 439 F. Supp. 2d 974 (terrorist surveillance program); *Arar*, 585 F.3d 559 (extraordinary rendition program).

their zeal to protect the national security," *Mitchell*, 472 U.S. at 511, the courts have an important responsibility to examine executive assertions of secrecy with a critical eye. "In an age when it can be argued that just about every sliver of information has some connection with intelligence and national security, too much judicial deference may be as great a danger to popular government as too little." Hon. Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 761 (1988).

II. In many instances, the government has made wrongful assertions to support withholding of information.

A. The government has asserted the state secrets privilege over information that was not a state secret.

Despite the Court's caution that the state secrets privilege is a privilege "not to be lightly invoked," *Reynolds*, 345 U.S. at 7, the executive's assertions of the state secrets privilege have increased significantly in recent years. Following *Reynolds*, "the [state secrets] privilege was asserted two times between 1961 and 1970, fourteen times between 1971 and 1980, twenty-three times between 1981 and 1990, twenty-six times between 1991 and 2000, and twenty times between 2001 and 2006." Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1938–39 (2007) (citing Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249 (2007)) (footnote omitted). Since 2006, the executive

has asserted the state secrets privilege in at least an additional twenty-nine cases.[4]

In many—and, it is to be hoped, most—instances, the government's assertion of privilege is meritorious. Nonetheless, later declassification of documents, FOIA requests, or subsequent proceedings in cases where the privilege was asserted have revealed that the executive's assertion of the state secrets privilege has been unfounded in a troubling number of cases. That the government has made wrongful assertions to support its withholding of information in any case, let alone several, highlights the need for judicial review.

For example, decades after the government successfully asserted the state secrets privilege in *Reynolds*, declassification revealed "that the goal of the government in claiming the privilege in *Reynolds* was to avoid liability and embarrassment," Weaver & Pallitto, 120 Pol. Sci. Q. at 99—not to protect any state secrets. In *Reynolds*, the widows of civilians killed in the crash of an Air Force plane, which was testing secret electronic equipment, sought production of the Air Force's accident investigation report. *Reynolds*,

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[4] The tally of twenty-nine cases is based on a Westlaw search for decisions issued after the last one included in Professor Chesney's study. It includes both published and unreported opinions, and it excludes opinions addressing the government's withholding under FOIA, 5 U.S.C. § 552, as well as opinions arising out of criminal prosecutions implicating the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3. The tally also counts as a single assertion of the state secrets privilege the multi-district litigation *In re National Security Agency Telecommunications Records Litigation*, No. 3:06-md-01791-VRW (N.D. Cal. 2006), in which approximately forty cases were consolidated into a single action. *See In re Nat'l Sec. Agency Telecomms. Recs. Litig.*, 444 F. Supp. 2d 1332 (J.P.M.L. 2006).

345 U.S. at 3. Asserting the state secrets privilege, the government refused to produce the report. *Id.* at 4. Without reviewing the report *in camera*, this Court concluded, based on the government's representations, that "[t]here was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment." *Id.* at 10. Accordingly, the Court ruled in favor of the government and refused to compel production of the report. *Id.* at 12.

Fifty-two years after the crash, the Air Force report was declassified, revealing that the report "contained no state secrets relating to national security" and that "[i]nstead, the report showed that the crash and resulting deaths were caused by ordinary negligence." Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L. Rev. 1, 92 (2008) (footnotes omitted). Commentators now recognize that the invocation of the state secrets privilege in *Reynolds* was "based on an executive impulse to conceal its own mistakes and to deny relief to those who had been wronged." *Id.* Ironically, in the very case where this Court stated that "judicial control" must not be "abdicated" to executive "caprice," *Reynolds*, 345 U.S. at 9–10, the plaintiff-widows were denied redress because of judicial failure to test the government's claims.

Reynolds is not an isolated example. In *Horn v. Huddle*, former Drug Enforcement Agency agent Richard Horn brought a *Bivens* action alleging that a State Department official and CIA agent had illegally spied on him. *See In re Sealed Case*, 494 F.3d 139. Granting a motion to dismiss, the district court ruled that the reports by the CIA's Inspector General describing the incidents were protected by the state

secrets privilege because the information would threaten to reveal the "identities of covert CIA officers," among other things. *Id.* at 142, 152; *see also* Laura K. Donohue, *The Shadow of State Secrets*, 159 U. Pa. L. Rev. 77, 175–76 (2010). Horn appealed, and the D.C. Circuit reversed the dismissal as to one defendant, explaining that Horn could establish a *prima facie* case without using the privileged information. 494 F.3d at 141. When the case returned to the district court, the government admitted in a court filing that "the basis for the government's invocation of the privilege … (that is, the 'covert agent' status of CIA agent Arthur Brown) had been incorrect." Donohue, 159 U. Pa. L. Rev. at 175–76 & n.462. As a result, nine years after the district court had accepted the government's assertion of state secrets privilege and five years after the district court had dismissed the case, it censured the government for its false assertion. *Id.* at 177 & n.471.

Likewise, in *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), the government "went too far" in invoking the state secrets privilege to withhold the names of the Attorneys General who had authorized warrantless electronic surveillance of individuals involved in the Pentagon Papers criminal prosecution. *Id.* at 59–60. Although the government prevailed in the district court on that issue, at oral argument in the court of appeals, the government "frankly conceded" that its *in camera* submissions and affidavits did not justify the withholding. *Id.* at 52. Ordering disclosure of that information, the court of appeals wrote: "We cannot see, and the government does not even purport to explain, how any further disruption of diplomatic relations or undesirable

education of hostile intelligence analysts would result from naming the responsible officials." *Id.* at 60.

In *Rahman v. Chertoff*, No. 05 C 3761, 2008 WL 4534407 (N.D. Ill. Apr. 16, 2008), the court rejected the government's claim of state secrets over information about whether the plaintiffs were listed in the terrorist screening database administered by the FBI. The court explained that in light of the government's prior disclosures of the purported state secrets information and the factual circumstances of the case, *id.* at *7, the government "failed to establish that … disclosure of that information would create a reasonable danger of jeopardizing national security." *Id.* at *8. Although the government argued in its brief that the disputed information "would reveal sources and methods of information gathering," at oral argument, the government conceded that the alleged state secrets information concerned only the plaintiffs' status in the database and "offered no explanation as to how the disclosure of [the database] status, without more, would reveal sources of information or methods of investigation." *Id.* at *6.

In other cases, the government has claimed the state secrets privilege over the subject matter of litigation when that subject was not, in fact, a secret. For example, in *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007), the government asserted that "the very subject matter of the litigation—the government's alleged warrantless surveillance program under the [terrorist surveillance program]" was actually a state secret. *Id.* at 1193. The court rejected that assertion, in light of the government's "extensive" public disclosures about the terrorist surveillance program, *id.*, and the fact that the program had been discussed "extensively in

publicly-filed pleadings, televised arguments in open court in this appeal, and in the media and the blogosphere," *id.* at 1198 (footnote omitted). As the court put it, "the government's many attempts to assuage citizens' fears that *they* have not been surveilled now doom the government's assertion that the very subject matter of this litigation, the existence of a warrantless surveillance program, is barred by the state secrets privilege." *Id.* at 1200.

Similarly, in a case alleging that the National Security Agency and AT&T were collaborating in a warrantless surveillance program, the government asserted that the subject matter of the case was a state secret. The court disagreed, holding that "the very subject matter of this action is hardly a secret" because "public disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program." *Hepting*, 439 F. Supp. 2d at 994.

In other cases, judges have determined that the government's assertion of state secrets was not proper based on *in camera* review of material the government claimed contained state secrets. For example, in *American Civil Liberties Union v. Brown*, 619 F.2d 1170 (7th Cir. 1980), the government asserted the state secrets privilege over an Army Field Manual and several Army Regulations in connection with a discovery dispute, on the ground that those materials "pertain to the 'claims of allegedly illegal domestic intelligence activities.'" *Id.* at 1172 (quoting the government's brief). After an *in camera* review of the documents, the district court "found State secrets not to exist." Sitting en banc, the Seventh Circuit, based on a "preliminary in camera examination of the material," similarly "conclude[d] that the existence of

state or military secrets therein is sufficiently dubious that the formal claim of privilege may not prevail." *Id.* at 1173. The court found that the documents did "not strictly concern past and ongoing foreign intelligence gathering," did not "appear to involve more than very general intelligence techniques," and were "unlikely to reveal to any foreign power the fact that surveillance of its activities has occurred, the targets and the extent of such surveillance, or the means by which it was accomplished." *Id.* at 1174.

In a pair of cases before the Court of International Trade, the court, after *in camera* review, rejected the government's attempt to claim the state secrets privilege over Commerce Department records relating to steel imports. *See U.S. Steel Corp. v. United States*, 578 F. Supp. 409, 410–11 (Ct. Int'l Trade 1983) (documents submitted by the Brazilian government and the World Bank to the Commerce Department "do[] not consist of state secrets and do[] not achieve the status of a state secret"), *vacated on other grounds*, 7 C.I.T. 117 (1984); *Republic Steel Corp. v. United States*, 538 F. Supp. 422, 422–23 (Ct. Int'l Trade 1982) (stating that examination of cables from the Commerce Department to a U.S. embassy in Romania regarding antidumping petitions "showed nothing in the nature of a state secret" and "nothing suggestive of delicate matters of foreign policy"), *vacated on other grounds*, 5 C.I.T. 1 (1983).

In addition to asserting the state secrets privilege improperly in some cases, the government has wrongly overstated the impact of the purported secret on the proceedings in others. For example, in *Ibrahim v. Department of Homeland Security*, 62 F. Supp. 3d 909 (N.D. Cal. 2014), the plaintiff challenged the inclusion of her name on government terrorist

watchlists. The government twice represented to the court that the effect of invoking the state secrets privilege would be to exclude the evidence at issue from trial. *Id.* at 913. Then at trial, the government went much further and, "[i]n stubborn resist[a]nce to letting the public and press see the details of this case, … made numerous motions to dismiss on various grounds, including an overbroad complete dismissal request based on state secrets." *Id.* at 935. After denying the government's motions to dismiss, the court conducted a bench trial and granted relief to the plaintiff. *Id.* at 915, 936.

Further, in *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), the government attempted to invoke the state secrets privilege to obtain dismissal of a case brought by a deceased Communist Party member's wife, who alleged various torts stemming from FBI intelligence activities. *Id.* at 474. After the district court denied the government's motion to dismiss, the government petitioned the court of appeals for mandamus directing dismissal. *Id.* After reviewing *in camera* an affidavit from the assistant director of the FBI's Intelligence Division, the court of appeals denied the petition, explaining that "an item-by-item determination of privilege will amply accommodate the Government's concerns." *Id.* at 478; *see id.* at 479 ("Because of the long lapse of time, the release by the Government to plaintiff of important information under the Freedom of Information Act, and the difficulties of relating the relevance in substance and time of much of the information in the [FBI] affidavit to the case at hand, we cannot reasonably determine merely on the basis of this *in camera* affidavit that evidence of the Government's activities of twenty to

thirty years ago will result in the disclosure of state secrets today.").

B. The government has made non-meritorious claims to secrecy in other contexts.

In addition to asserting the state secrets privilege in instances where it is unwarranted, the government has, in a troubling number of instances, misused other tools to conceal information. Such tools include classification and withholding under FOIA.

1. The government's over-classification of information is broadly acknowledged, including by high-ranking executive officials. For example, in the Pentagon Papers case, the government represented that publication posed a "grave and immediate danger to the security of the United States." *New York Times Co.*, 403 U.S. at 741 (Marshall, J., concurring) (quoting Brief for the United States 7). Yet former Solicitor General Erwin N. Griswold, who had argued the government's case to this Court, later acknowledged that he never saw "any trace of a threat to the national security from the publication," nor had he ever seen it "even suggested that there was such an actual threat." Erwin N. Griswold, Op-Ed., *Secrets Not Worth Keeping*, Wash. Post, Feb. 15, 1989, https://wapo.st/3DaTWg2. He went on: "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification, and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." *Id.*

Griswold's commentary echoed that of then-Attorney General Herbert Brownell, who informed

President Eisenhower in 1953 that classification procedures were "so broadly drawn and loosely administered as to make it possible for government officials to cover up their own mistakes and even their wrongdoing under the guise of protecting national security." Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* 145 (2021) (quoting Brownell). More recently, then-Secretary of Defense Donald Rumsfeld acknowledged, "I have long believed that too much material is classified across the federal government as a general rule[.]" Donald H. Rumsfeld, Op-Ed., *War of the Words*, Wall St. J., July 18, 2005, https://on.wsj.com/3iZY8Y0.

Similarly, in congressional testimony in 2005, the then-Director of the National Archives and Record Administration's Information Security Oversight Office stated: "[I]t is my view that the Government classifies too much information; primarily, I believe, because classifieds often becomes an automatic decision rather than an informed, deliberate decision." *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. 45 (2005) (statement of J. William Leonard). Then-Chair of the House Permanent Select Committee on Intelligence Porter Goss, who later became the CIA Director, told the 9/11 Commission: "[W]e over-classify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for [it]." *Hearing of the Nat'l Comm'n on Terrorist Attacks Upon the United States* (9/11 Commission) (May 22, 2003), https://bit.ly/2W4xFiX.

One example of the government's misclassification of material is the case of Sibel Edmonds. Following the

9/11 terrorist attacks, the FBI hired Ms. Edmonds as a contract linguist to perform translation services, but then fired her after Ms. Edmonds reported to her supervisors security breaches and misconduct in the FBI translation unit where she worked. *See Edmonds*, 323 F. Supp. 2d at 68. After Ms. Edmonds filed a lawsuit alleging retaliatory dismissal, among other claims, the government retroactively classified information relating to Ms. Edmonds's case, including previously unclassified Senate Judiciary Committee materials and letters from Senators Patrick Leahy and Chuck Grassley to Justice Department officials that had been posted on the Senators' websites. *See* Donohue, 159 U. Pa. L. Rev. at 193; Complaint, *Project on Gov't Oversight v. Ashcroft*, No. 1:04CV01032 (JDB) (D.D.C. June 23, 2004), ECF No. 1. After a lawsuit was filed against the Justice Department challenging the retroactive classification, the government admitted that the information could be released to the public. *See* Stipulation, *Project on Gov't Oversight v. Ashcroft*, No. 1:04CV01032 (JDB) (D.D.C. Mar. 9, 2004), ECF No. 19.

Indeed, according to estimates by various executive officials, a striking *fifty to ninety percent* of material designated classified is over-classified. In 2005, former Deputy Undersecretary for Counterintelligence and Security Carol A. Haave testified that approximately fifty percent of classification decisions comprise over-classifications of material. *Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats and Int'l Relations of the H. Comm. on Gov't Reform*, 108th Cong. 82 (2005). After the 9/11 Commission reviewed government records about Al Qaeda and Osama Bin Laden, the

9/11 Commission Chairman Thomas H. Kean reportedly stated, "Three-quarters of what I read that was classified shouldn't have been." *Emerging Threats*, 109th Cong. 121 (statement by Thomas S. Blanton) (citing *Lawmakers Frustrated by Delays in Declassifying Documents*, Cox News Service, July 21, 2004). And former National Security Council Executive Secretary Rodney B. McDaniel estimated that only *ten* percent of classification decisions were legitimate. *See Rethinking Classification: Better Protection and Greater Openness*, Report of the Comm'n on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2 (1997).

Despite the widespread acknowledgement of over-classification, statistics maintained by the National Archives and Records Administration's Information Security Oversight Office show that the government's classification of material has increased dramatically over the past two decades—from approximately 5.8 million classification decisions in fiscal year 1996, to approximately 14.2 million classification decisions in fiscal year 2005, to more than 49 million classification decisions in fiscal year 2017.[5] If fifty percent of the classification decisions in fiscal year 2017 over-

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[5] *See* Nat'l Archives and Records Admin., Information Security Oversight Office 2010 Report to the President at 12 (2011), https://bit.ly/37SdE1y (combined original and derivative classification activity, from fiscal year 1996–2010); *see also* Nat'l Archives and Records Admin., Information Security Oversight Office 2017 Report to the President at 1 (2018), https://bit.ly/3g9Xe9p.

For fiscal year 2010, the Information Security Oversight Office reported the remarkably high total of more than 76 million classification decisions. *See* Information Security Oversight Office 2010 Report to the President at 12.

classified material, then the government over-classified material in more than 24 *million* classification decisions in a single year.

2. In numerous FOIA cases, courts have criticized the government's improper withholding of information. For example, *Citizens for Responsibility & Ethics in Washington v. DOJ*, __ F. Supp. 3d ___, No. CV 19-1552 (ABJ), 2021 WL 2652852 (D.D.C. May 3, 2021), concerned a FOIA request for documents reviewed by then-Attorney General Barr in advance of his public announcement regarding the results of Special Counsel Robert Mueller's investigation into Russian interference with the 2016 presidential election. Upon *in camera* review of a memorandum that the government had withheld from the requester on the basis of the deliberative process privilege incorporated into FOIA exemption 5, the district court found that the government had misrepresented the information at issue:

> [T]he affidavits are so inconsistent with evidence in the record, they are not worthy of credence. The review of the unredacted document *in camera* reveals that … not only was the Attorney General being disingenuous [regarding the Mueller Report], but DOJ has been disingenuous to this Court with respect to the existence of a decision-making process that should be shielded by the deliberative process privilege. The agency's redactions and incomplete explanations obfuscate the true purpose of the memorandum, and the excised portions contradict the [agency's assertion of deliberation].

Id. at *14.

The court determined that the agency officials had mischaracterized the disputed information in their affidavits and that the Justice Department attorneys handling the case had made misrepresentations to the court. *See id.* at *13 ("[T]he *in camera* review of the document, which DOJ strongly resisted, raises serious questions about how the Department of Justice could make this series of representations to a court in support of its 2020 motion for summary judgment." (internal citation omitted)). In a subsequent order, the court stated that the agency's declarations and pleadings were "misleading" and that "[t]he [Justice] Department chose not to tell the Court the purpose of the memorandum or subject it addressed *at all*, and no amount of apologizing for 'imprecision' in the language it did use can cure the impact of that fundamental omission." Order 3, *Citizens for Resp. & Ethics in Washington v. DOJ*, No. CV 19-1552 (ABJ) (D.D.C. June 14, 2021), ECF No. 35.

Other examples of government misrepresentations in FOIA cases abound. In *Islamic Shura Council of Southern California v. FBI*, 779 F. Supp. 2d 1114 (C.D. Cal. 2011), the government lied to the district court—and attempted to argue that it was appropriate for the government to do so in the "interests of national security." *Id.* at 1125. There, the plaintiffs challenged the adequacy of the government's search in response to a FOIA request for information reflecting investigation or surveillance of the plaintiffs by the FBI. After reviewing an *in camera* submission from the government, the court determined that the government's representations in its pleadings, declarations, and briefs were "blatantly false." *Id.* at 1117. "Simply put, the Government lied to the Court." *Islamic Shura Council of S. Calif. v.*

FBI, 278 F.R.D. 538, 545 (C.D. Cal. 2011) (granting motion for sanctions).[6]

Another court similarly concluded that "the [g]overnment acted without the candor this Court expects from it" in a case involving the government's withholding of Foreign Intelligence Surveillance Court opinions and orders regarding the bulk collection of information (such as telephony metadata). *ACLU v. FBI*, 59 F. Supp. 3d 584, 591 (S.D.N.Y. 2014). In that case, the government contended that Foreign Intelligence Surveillance Court rules and procedures restricted release of records responsive to the ACLU's FOIA request. *Id.* at 590. Rejecting that argument, the court noted that "the [g]overnment appears to have been dissembling" in light of its previous position that Foreign Intelligence Surveillance Court records *could* be released in response to a FOIA request. *Id.* at 590–91 (stating that the government's argument "strains credulity").

Although in many FOIA cases the government's assertion of an exemption is proper, in many others courts have determined that the government has mischaracterized and wrongly withheld the information at issue. *See, e.g.*, *Citizens for Resp. & Ethics in Washington v. GSA*, No. CV 18-2071 (CKK), 2021 WL 1177797, at *8 (D.D.C. Mar. 29, 2021) (government's redactions of an email on the basis of exemption 5 were improper where the email failed to "include any 'recommendations' or 'consultations,'

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[6] The order imposing sanctions was later reversed because the motion was served too late, "after 'judicial rejection of the offending contention.'" *Islamic Shura Council of S. Calif. v. FBI*, 757 F.3d 870, 873 (9th Cir. 2014) (citation omitted).

much less any 'deliberation'" and "[r]eview of the unredacted version of this email does not align with GSA's description in its *Vaughn* Index"); *New York Times Co. v. OMB*, No. CV 19-3562 (ABJ), 2021 WL 1329025, at *8 (D.D.C. Mar. 29, 2021) (government's withholding of records on the basis of exemption 5 was wrong where "there were obvious differences between the affiants' description of the nature and subject matter of the documents, and the documents themselves" and the agency's declarations "were contradicted by other evidence in the record"); *Cause of Action Inst. v. Export-Import Bank of the U.S.*, No. 19-cv-1915 (JEB), 2021 WL 706612, at *14 (D.D.C. Feb. 23, 2021) (ordering disclosure of records where "[e]ven the briefest *in camera* review reveals that [defendant's] description is plainly overbroad and—at least with respect to some of the withheld documents—seemingly inaccurate, as their content has nothing to do with" the asserted justification for withholding under exemption 5); *ACLU v. FBI*, 429 F. Supp. 2d 179, 192–93 (D.D.C. 2006) (government's withholding of information was improper because "the government cannot rely on [e]xemption 1 for material that is not classified"); *Lurie v. Dep't of Army*, 970 F. Supp. 19, 41 (D.D.C. 1997) (government's withholding of a memorandum under exemption 5 was wrong because "contrary to the Army's boilerplate, the Court cannot find 'any' personal opinions in the redacted material to justify invoking the deliberative process privilege").

* * * *

For the government to be afforded the "utmost deference" that it requests (*see, e.g.*, U.S. Br. 22), it must act with the utmost candor. It may well be that,

in the majority of cases, and perhaps a large majority, the government is correct in its assertions of secrecy. But the government has made improper claims of withholding in too many cases to be disregarded, and there is too much at stake for the judicial branch to simply defer to the government's say-so. Given the severity of the consequences suffered by private litigants who risk losing their day in court, the incentives for potential abuse by the government, and the substantial risk that the government's claims may, deliberately or not, be wrong, the courts offer a critical check, ensuring that assertions of the state secrets privilege are proper. *See Reynolds*, 345 U.S. at 11 (stating that the court must "satisfy[] itself that the occasion for invoking the privilege is appropriate").

Courts are competent and well-equipped to play this role, exercising judgment about whether information is sensitive and the appropriate measures to take when it is. *See United States v. United States District Court* (*Keith*), 407 U.S. 297 (1972) ("We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985) ("Often, through creativity and care, this unfairness can be minimized through the use of procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form."); *Ellsberg*, 709 F.2d at 57 (stating that "the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter").

III. The decision below correctly recognized that the government's privilege claim must be critically examined and that nonprivileged information must be disentangled and disclosed wherever feasible.

The holding below was "a limited one." Pet. App. 27a. The court of appeals did not order disclosure of information; it remanded the case for the district court to examine whether it was possible for privileged information to be disentangled from nonprivileged information. Emphasizing the limited nature of its holding, the court stated that, if the district court determined that the privileged information could *not* be disentangled, the district court could again dismiss the case. *Id.* 28a.

In ordering remand, the court of appeals correctly recognized the judiciary's "special burden to assure … that an appropriate balance is struck between protecting national security matters and preserving an open court system." *Id*. 27a (citation omitted). As the court noted, the district court has a "panoply of tools at its disposal," *id*. 27a, to safeguard the disclosure of privileged information, such that discovery of nonprivileged information may proceed. For example, in a different case involving similar information—*Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2016)—respondents Mitchell and Jessen provided nonprivileged deposition testimony, "illustrating the viability of th[e] disentanglement" of privileged information from nonprivileged information. Pet. App. 26a. "Excerpts of those depositions were included in the record and reflect how depositions could proceed in this case, such as with the use of code names and pseudonyms, where appropriate." *Id.* In addition, the district court could

"use the Pompeo declarations as a guide while employing tools such as in camera review, protective orders, and restrictions on testimony, in tailoring the scope of Mitchell's and Jessen's deposition and the documents they may be required to produce." *Id.* 27a.

The government's brief breathes no mention of *Salim*, the feasibility of procedural safeguards, or the panel's directive to consider whether privileged information could be disentangled from nonprivileged information. Rather, the crux of the government's disagreement is with the court's determination that courts have an "essential obligation to review state secrets critically, with a skeptical eye," Pet. App. 17a n.14. *See* U.S. Br. 19, 25. The government contends, as did the dissent below, that by independently examining the government's assertions of state secrets, the court "failed to afford 'any apparent deference'" to the executive. U.S. Br. 26 (quoting Pet. App. 93a, 97a (Bress, J., dissenting from the denial of rehearing en banc)); Pet. App. 30a (Gould, J., dissenting). The government's preferred approach, however, would knock the teeth out of any meaningful judicial review of the executive's assertions of state secrets, effectively eliminating the judiciary's role in providing a check on the executive branch in this area. Under that approach, courts would be "left with nothing to do but accept the government's assertions at face value." Pet. App. 82a (Paez, J., concurring in the denial of rehearing en banc). "Such an approach, besides contradicting Supreme Court precedent, is antithetical to democratic governance and will inevitably breed abuse and misconduct." *Id.*

The state secrets privilege should not provide the executive with a blank check. To ensure that "judicial control over the evidence in a case [is not] abdicate[d]

to the caprice of executive officers," *Reynolds*, 345 U.S. at 9–10, the courts have an important responsibility to examine critically the executive's claims of state secrets privilege and, where possible, fashion procedures that respect both meritorious assertions of privilege and private litigants' interest in pursuing their claims. The decision below correctly required the district court to undertake that task.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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